

## FitnessGram® Hosting Services Terms of Use

Updated October 24, 2016

As a Customer (“Customer” or “you” or “your”) hereby agree that these Terms of Use (“**Terms**” or “**Agreement**”) govern your use of The Cooper Institute® (“The Cooper Institute®” or “we” or “our”) Hosting Services (collectively, “**Services**”) and the FitnessGram® Software, a fitness education assessment program software that we include as part of the Services, including any applications, Content (defined below), scripts, instruction sets, and any related documentation (collectively “**FitnessGram® Software**”). By using the Services or FitnessGram® Software, you agree to these terms. **As discussed more in Section 3 below, you retain all rights and ownership you have in your Content that you make available through the Services.**

### 1. How this Agreement Works.

1.1 **Eligibility.** You may only use the Services if you agree to the Privacy Policy regarding authority to access the Services under the appropriate law.

1.2 **Privacy.** The Privacy Policy at <https://myhealthyzone.fitnessgram.net/> governs any personal information you provide to us. **By using the Services or FitnessGram® Software you agree to the terms of the Privacy Policy.**

1.3 **FitnessGram® Software.** The FitnessGram® Software means, collectively, all of the present and future FitnessGram® Software packages or programs, including without limitation, FitnessGram®, MyHealthyZone™, ActivityGram®, Healthy Fitness Zone®, and Activity Log, and their related components. The FitnessGram® Software is **licensed, not sold**, only in accordance with these Terms.

1.4 **FitnessGram® Marks.** For the purposes of this Agreement, "The Cooper Institute® Marks" means the following trademarks, service marks, service or trade names, logos, product names, or designations of The Cooper Institute® and its affiliates: “MyHealthyZone™,” “FitnessGram®,” “ActivityGram®,” “Healthy Fitness Zone®,” together with all goodwill associated therewith, and any other The Cooper Institute® Marks made available from time to time.

1.5 **Sales Order.** The Terms of this Agreement shall apply after paying the related fees found at <http://www.cooperinstitute.org/fitnessgram/buy-now> and providing all required technical data to allow Hosting, and thereby creating an account for The Cooper Institute® Hosting Services (“Account”).

1.6 **Publicity.** Customer agrees that the names and other information of and concerning The Cooper Institute®, the Cooper Aerobics Enterprises™ and Dr. Kenneth H. Cooper, M.D., M.P.H. cannot be used by Customer without prior written approval from The Cooper Institute®.

**1.7 Frequently Asked Questions (FAQ).** Customer may find answers to FAQs about FitnessGram® at <http://www.cooperinstitute.org/FGFAQ.pdf>

**1.8 Order of Precedence.** If there is any conflict between the terms in this Agreement and the Sales Order, then terms of this Agreement govern.

**1.8 Modification.** We may modify or discontinue the Services, FitnessGram® Software, or any portions or features thereof at any time without liability to you or anyone else. However, we will make reasonable effort to notify you before we make the change. If we discontinue a Service in its entirety, we will also allow you a reasonable time to download your Content, and we will provide you with a pro rata refund for any unused fees for that Service that you may have prepaid.

## **2. Use of Services.**

**2.1 License.** Subject to your compliance with this Agreement and the law, you may access and use the Services and the FitnessGram® Software.

**2.2 The Cooper Institute® Intellectual Property.** We remain the sole owner of all right, title, and interest in the intellectual property in the FitnessGram® Software. We reserve all rights not granted under these Terms.

**2.3 Storage.** We may create reasonable technical limits on your Content, such as limits on file size, storage space, processing capacity, and other technical limits. We may suspend the Services until you are within the storage space limit associated with your Account.

## **3. Your Content.**

**3.1 Your Content.** Content means the information and data provided by you concerning your students, schools, and operations.

**3.2 Ownership. You retain all rights and ownership of your Content. The Cooper Institute® does not claim any ownership rights to your Content.**

**3.3 Importing your Content.** In order for you to import your Content to The Cooper Institute® Hosting Services you agree to specifically comply with all steps to import or reimport file data available through <https://myhealthyzone.fitnessgram.net/>.

**3.4. Licenses to Your Content in Order to Operate the Services.** We require certain licenses from you to your Content to operate and enable the Services. When you upload Content to the Services, you grant The Cooper Institute® a non-exclusive, worldwide, royalty-free, sub-licensable, and transferrable license to use, reproduce, and translate the Content as needed in response to your use of the Services and FitnessGram® Software (such as when you choose to

share your Content with others). **This license is only for the purpose of operating and improving the Services.**

**3.5 Our Access.** We will not access, or view to any of your Content, except as reasonably necessary to perform the Services. Actions reasonably necessary to perform the Services may include (but are not limited to) (a) responding to support requests; (b) detecting, preventing, or otherwise addressing fraud, security, unlawful, or technical issues; and (c) enforcing these Terms.

### **3.6 Sharing Your Content.**

**(a) Sharing.** Some Services may provide features that allow you to Share your Content with other users or to make it public. “**Share**” means to email, post, transmit, upload, or otherwise make available (whether to The Cooper Institute® or other users) through your use of the Services. Other users may use, copy, modify, or re-share your Content in many ways. Please consider carefully what you choose to Share or make public, as you are entirely responsible for the Content that you Share.

**(b) Level of Access.** We do not monitor or control what others do with your Content. You are responsible for determining the limitations that are placed on your Content and for applying the appropriate level of access to your Content. If you do not choose the access level to apply to your Content, the system may default to its most permissive setting. It is your responsibility to let other users know how your Content may be shared and adjust the setting related to accessing or sharing of your Content.

**3.7 Termination of License.** You may revoke this license to your Content and terminate our rights at any time by removing your Content from the Service. However, some copies of your Content may be retained as part of our routine backups.

**3.8 Feedback.** You have no obligation to provide The Cooper Institute® with ideas, suggestions, or proposals (“**Feedback**”). However, if you submit Feedback to us, then you grant The Cooper Institute® a non-exclusive, worldwide, royalty-free license that is sub-licensable and transferrable, to use, reproduce, publicly display, distribute, modify, and publicly perform the Feedback.

**3.9 Account Information.** You are responsible for all activity that occurs via your Account. Please notify FitnessGram® Customer Support ([support@FitnessGram.net](mailto:support@FitnessGram.net)) immediately if you become aware of any unauthorized use of your Account. You may not (a) Share your Account information (except with an authorized Account administrator) or (b) use another person’s Account. Your Account administrator may use your Account information to manage your use and access to the Services.

## **4. Use of FitnessGram® Software.**

**4.1 Subscription-Based FitnessGram® Software License.** We are providing the FitnessGram® Software to you as part of your subscription to use the Services, which are subject to your compliance with these Terms, we grant you a non-exclusive license to install and use the FitnessGram® Software: (a) in the Territory, (b) so long as your subscription is valid, and (c) consistent with these Terms and related documentation accompanying the FitnessGram® Software. “**Territory**” means your school district established when your Account was created. The FitnessGram® Software requires you to take certain steps to activate your FitnessGram® Software or validate your subscription. Failure to activate or register the FitnessGram® Software, validate the subscription, or a determination by The Cooper Institute® of fraudulent or unauthorized use of the FitnessGram® Software may result in reduced functionality, inoperability of the FitnessGram® Software, or a termination or suspension of the subscription.

**4.2 General License.** If the FitnessGram® Software is provided as part of the Services without restrictions on subscription or number of devices, then subject to your compliance with these Terms, we grant you a non-exclusive license to install and use the FitnessGram® Software (a) in the Territory, (b) for the purpose of using and accessing of the Services, and (c) consistent with these Terms and related documentation accompanying the FitnessGram® Software.

#### **4.3 Restrictions and Requirements.**

(a) **Proprietary Notices.** You must ensure that any permitted copy of the FitnessGram® Software that you make contains the same copyright, trademark, and other proprietary notices that appear on or in the FitnessGram® Software.

(b) **Restrictions.** Unless permitted in these Terms, you must not:

- (1) Modify, port, adapt, or translate the FitnessGram® Software;
- (2) Reverse engineer, decompile, disassemble, or otherwise attempt to discover the source code of the FitnessGram® Software;
- (3) Use or offer the FitnessGram® Software on a service bureau basis;
- (4) Circumvent technological measures intended to control access to the FitnessGram® Software
- (5) Develop, distribute, or use with the FitnessGram® Software, products that circumvent the technological measures; or
- (6) Rent, lease, sell, sublicense, assign, or transfer your rights in the FitnessGram® Software, or authorize any portion of the FitnessGram® Software to be copied onto another’s device. If you purchase Services for education (named user), then you may designate seats pursuant to the applicable documentation.

(c) **Responsible Use.** The Cooper Institute® communities often consist of users who expect a certain degree of courtesy and professionalism. You must use the Services responsibly. You must not misuse the Services or FitnessGram® Software. For example, you must not:

- (1) Copy, modify, host, sublicense, or resell the Services;
- (2) Enable or allow others to use the Services or FitnessGram® Software using your Account information;
- (3) Access or attempt to access the Services by any means other than the interface we provided or authorized;
- (4) Circumvent any access or use restrictions put into place to prevent certain uses of the Services;
- (5) Engage in behavior that violates anyone's Intellectual Property Right (“**Intellectual Property Rights**” means copyright, moral rights, trademark, trade dress, patent, trade secret, unfair competition, right of privacy, right of publicity, and any other proprietary rights.);
- (6) Share any information that is unlawful, harmful, threatening, abusive, tortious, defamatory, libelous, vulgar, lewd, profane, invasive of another's privacy, or hateful;
- (7) Impersonate any person or entity, or falsely state or otherwise misrepresent your affiliation with a person or entity;
- (8) Attempt to disable, impair, or destroy the Services, software, or hardware;
- (9) Disrupt, interfere with, or inhibit any other user from using the Services (such as stalking, intimidating, or harassing others, inciting others to commit violence, or harming minors in any way),
- (10) Engage in chain letters, junk mails, pyramid schemes, spamming, or other unsolicited messages;
- (11) Market or advertise any products or services through the Services unless we specifically allowed you to do so;
- (12) Use any data mining or similar data gathering and extraction methods in connection with the Services; or
- (13) Violate applicable law.

## 6. Fees.

You must pay any applicable taxes unless you can prove your tax exempt status, and any applicable third-party fee (including, for example telephone toll charges, mobile carrier fees, ISP charges, data plan charges, credit card fees, foreign exchange fees). We are not responsible for these fees. We may take steps to collect the fees you owe us. You are responsible for all related collection costs and expenses.

## **7. Your Warranty and Indemnification Obligations.**

**7.1 Warranty.** By uploading your Content to the Services, you agree that you have all necessary licenses and permissions, to use and Share your Content.

**7.2 Indemnification.** You will indemnify The Cooper Institute® and our subsidiaries, affiliates, officers, agents, employees, partners, and licensors from any claim, demand, loss, or damages, including reasonable attorneys' fees, arising out of or related to your Content, your use of the Services or FitnessGram® Software, or your violation of these Terms of this Agreement.

## **8. Disclaimers of Warranties.**

**8.1 UNLESS STATED IN THE THIS AGREEMENT, THE SERVICES AND FITNESSGRAM® SOFTWARE ARE PROVIDED “AS-IS.” TO THE MAXIMUM EXTENT PERMITTED BY LAW, WE DISCLAIM ALL WARRANTIES EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF NON-INFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR PURPOSE. WE MAKE NO COMMITMENTS ABOUT THE CONTENT WITHIN THE SERVICES. WE FURTHER DISCLAIM ANY WARRANTY THAT (A) THE SERVICES OR SOFTWARE WILL MEET YOUR REQUIREMENTS OR WILL BE CONSTANTLY AVAILABLE, UNINTERRUPTED, TIMELY, SECURE, OR ERROR-FREE; (B) THE RESULTS THAT MAY BE OBTAINED FROM THE USE OF THE SERVICES OR SOFTWARE WILL BE EFFECTIVE, ACCURATE, OR RELIABLE; (C) THE QUALITY OF THE SERVICES OR SOFTWARE WILL MEET YOUR EXPECTATIONS; OR THAT (D) ANY ERRORS OR DEFECTS IN THE SERVICES OR SOFTWARE WILL BE CORRECTED.**

**8.2 WE SPECIFICALLY DISCLAIM ANY LIABILITY FOR ANY ACTIONS RESULTING FROM YOUR USE OF ANY SERVICES OR SOFTWARE. YOU MAY USE AND ACCESS THE SERVICES OR SOFTWARE AT YOUR OWN DISCRETION AND RISK, AND YOU ARE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM OR LOSS OF DATA THAT RESULTS FROM THE USE AND ACCESS OF ANY SERVICE OR SOFTWARE.**

## **9. Limitation of Liability.**

**9.1 UNLESS STATED IN THIS AGREEMENT, WE ARE NOT LIABLE TO YOU OR ANYONE ELSE FOR ANY SPECIAL, INCIDENTAL, DIRECT, INDIRECT, CONSEQUENTIAL, OR PUNITIVE DAMAGES WHATSOEVER (EVEN IF WE HAVE**

**BEEN ADVISED OF THE POSSIBILITY OF THESE DAMAGES), INCLUDING THOSE (A) RESULTING FROM LOSS OF USE, DATA, OR PROFITS, WHETHER OR NOT FORESEEABLE, (B) BASED ON ANY THEORY OF LIABILITY, INCLUDING BREACH OF CONTRACT OR WARRANTY, NEGLIGENCE OR OTHER TORTIOUS ACTION, OR (C) ARISING FROM ANY OTHER CLAIM ARISING OUT OF OR IN CONNECTION WITH YOUR USE OF OR ACCESS TO THE SERVICES OR SOFTWARE. NOTHING IN THESE TERMS LIMITS OR EXCLUDES OUR LIABILITY FOR GROSS NEGLIGENCE, FOR OUR (OR OUR EMPLOYEES') INTENTIONAL MISCONDUCT, OR FOR DEATH OR PERSONAL INJURY.**

**9.2 OUR TOTAL LIABILITY IN ANY MATTER ARISING OUT OF OR RELATED TO THESE TERMS IS LIMITED TO US \$100 OR THE AGGREGATE AMOUNT THAT YOU PAID FOR ACCESS TO THE SERVICE AND SOFTWARE DURING THE MONTH PRECEDING THE EVENT GIVING RISE TO THE LIABILITY, WHICHEVER IS LARGER. THIS LIMITATION WILL APPLY EVEN IF WE HAVE BEEN ADVISED OF THE POSSIBILITY OF THE LIABILITY EXCEEDING THE AMOUNT AND NOTWITHSTANDING ANY FAILURE OF ESSENTIAL PURPOSE OF ANY LIMITED REMEDY.**

**9.3 THE LIMITATIONS AND EXCLUSIONS IN THIS SECTION 9 APPLY TO THE MAXIMUM EXTENT PERMITTED BY LAW.**

## **10. Termination.**

**10.1 Termination by You.** You may stop using the Services at any time. Termination of your Account does not relieve you of any obligation to pay any outstanding fees.

**10.2 Termination by Us.** We may terminate these Terms if we elect to discontinue the Services or FitnessGram® Software, in whole or in part and we will notify you at least 30 days prior to termination via the email address you provide to The Cooper Institute® with instructions on how to retrieve your Content. If we terminate these Terms for cause, then we will notify you at least 30 days prior to termination via the email address you provide to The Cooper Institute® with instructions on how to retrieve your Content. Unless stated in this Agreement, we may at any time terminate these Terms with you if:

- (a) You breach any provision of these Terms (or act in a manner that clearly shows you do not intend to, or are unable to, comply with these Terms);
- (b) You fail to make the timely payment of fees for the FitnessGram® Software or the Services, if any;
- (c) We are required to do so by law (for example, where the provision of the Services or FitnessGram® Software to you is, or becomes, unlawful); or,

**10.3 Survival.** Upon expiration or termination of these Terms, any perpetual licenses granted, your indemnification obligations, our warranty disclaimers or limitations of liabilities and dispute resolution provisions stated in these Terms will survive. Upon the expiration or termination of the Services, some or all of the FitnessGram® Software may cease to operate without prior notice.

## **11. Investigations.**

**11.1 Screening.** We do not review Content uploaded to the Services, but we may use available technologies or processes to screen for certain types of illegal information (for example, child pornography) or other abusive information or behavior (for example, patterns of activity that indicate spam or phishing, or keywords).

**11.2 Disclosure.** We may access or disclose information about you, or your use of the Services, (a) when it is required by law (such as when we receive a valid subpoena or search warrant); (b) to respond to your requests for customer service support; or (c) when we, in our discretion, think it is necessary to protect the rights, property, or personal safety of us, our users, or the public.

**12. Export Control Laws.** The FitnessGram® Software, Services, Content, and your use of the FitnessGram® Software, Services, and Content, are subject to U.S. and international laws, restrictions, and regulations that may govern the import, export, and use of the FitnessGram® Software, Services, and Content. You agree to comply with all the laws, restrictions, and regulations.

## **13. Dispute Resolution.**

**13.1 Venue.** Any claim or dispute you may have against The Cooper Institute® must be resolved by a court located in Dallas County, Texas, U.S.A. under the law of Texas, U.S.A. You agree to submit to the personal jurisdiction of the applicable court in Dallas County, Texas for the purpose of litigating the claim or dispute. The parties specifically disclaim the applicability of the U.N. Convention on Contracts for the International Sale of Goods.

**13.2 Injunctive Relief.** Notwithstanding the foregoing, in the event of your or others' unauthorized access to or use of the Services in violation of these Terms you agree that we are entitled to apply for injunctive remedies (or an equivalent type of urgent legal relief) in any jurisdiction.

## **14. Miscellaneous.**

**14.1 Notice to The Cooper Institute®.** You may send the notices to The Cooper Institute® to at the following address: The Cooper Institute®, 12330 Preston Road, Dallas, TX 75230, Attention: Chief Executive Officer.



14.2 **Notice to You.** We may notify you by email, postal mail, postings within the Services, or other legally acceptable means.

14.3 **Entire Agreement.** This Agreement constitutes the entire agreement between you and The Cooper Institute® regarding your use of the Services and FitnessGram® Software and supersedes any prior agreements between you and The Cooper Institute® relating to the Services.

14.4 **Non-Assignment.** You may not assign or otherwise transfer these Terms or your rights and obligations under these Terms, in whole or in part, without our written consent. We may transfer our rights under these Terms to a third party.

14.5 **Severability.** If a particular term is not enforceable, the unenforceability of that term will not affect any other Terms.

14.6 **No Waiver.** Our failure to enforce or exercise any of these Terms is not a waiver of that section.